UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BEAIRD COMPANY, LTD.

and **Case 15-CA-17366**

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL WORKERS LOCAL 2297, AFL-CIO

ORDER

This matter is before the Board pursuant to petitions to revoke two investigatory subpoenas duces tecum (B-469642 and B-469643) and two investigatory subpoenas ad testificandum (A-727601 and A-727602). The subpoenas were served on newspaper journalists Edward J. Randolph and Mike Hasten in connection with the Regional Office's investigation of an unfair labor practice charge filed against the Employer by the Union. The charge, as amended, alleges, inter alia, that the Employer is a perfectly clear successor within the meaning of *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972), and that it violated Section 8(a)(5) and (1) of the Act by failing to honor the Union's collective-bargaining agreement with predecessor Beaird Industries, Inc.

The subpoenas seek documentary and testimonial evidence to authenticate certain statements Randolph and

Hasten ascribed to the Employer's principal owner, Samuel Eakin, in newspaper articles. In separate articles, the Petitioners reported that Eakin announced that no employees would lose their jobs as a result of the Employer's purchase of the predecessor.

After receiving the subpoenas, Randolph and Hasten each filed timely petitions to revoke. The Region filed separate oppositions, and Hasten filed a reply to the Region's opposition.

Both Petitioners claim that as journalists they are protected from compelled disclosure of their news gathering activities by virtue of a qualified privilege arising from the First Amendment. The Petitioners submit that the Region can overcome the claimed qualified privilege only by showing that the subpoenaed documents and testimony are: (1) highly relevant and material; (2) central to the Region's investigation; and (3) not available from alternative sources.[1]

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[1] See La. Rev. Stat. Ann. Secs. 45:1451-1459 (imposing similar multi-factor balancing test). See also *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980), modified on rehearing 628 F.2d 932 (5th Cir. 1980), cert. denied 450 U.S. 1041 (1981)(concluding that First Amendment gives rise to a qualified privilege shielding journalists from compelled disclosure of confidential sources; but privilege must yield upon a showing of relevancy, compelling interest, and lack of alternative sources).

Randolph does not provide any supporting argument or authority. However, Hasten provides an extensive analysis of the claimed constitutional privilege, starting with the Supreme Court's decision in *Branzburg v. Hayes*, 408 U.S. 665, 709-710 (1972). Hasten also points to Louisiana's shield law, La. Rev. Stat. Ann. Secs. 45:1451-1459, and Louisiana's constitution, as providing further support.

We deny the petitions to revoke. The subpoenas seek information relevant to the unfair labor practice charge under investigation, and the Petitioners have failed to establish any basis for revoking the subpoenas. See *American Postal Workers Union, Local 64*, 340 NLRB 912-913 (2003); *Offshore Mariners United*, 338 NLRB 745 (2002); *NLRB v. North Bay Plumbing*, 102 F.3d 1005 (9th Cir. 1996); *NLRB v. Carolina Food Processors, Inc.*, 81 F.3d 507, 512 (4th Cir. 1996). With respect to the Petitioners' privilege contention, we find it unnecessary to decide whether the claimed privilege applies because, even assuming that it does, it appears that the Region can overcome the privilege under the balancing test urged by the Petitioners.

As an initial matter, in balancing the Region's need for the subpoenaed information against the Petitioners' assertions that the subpoenas intrude upon protected First Amendment rights, we find it significant that the

Petitioners do not allege that the information sought was obtained through a promise of confidentiality or that disclosure of the information would likely lead to the discovery of confidential information or sources. In these circumstances, the burden on the Petitioners of production and the concomitant chill on the free flow of information are relatively slight. Hence, a lesser showing of need and materiality may be required to overcome the claimed privilege.[2]

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[2] The Fifth Circuit, where this case arises, has recognized a First Amendment-based qualified journalists' privilege, but has held that confidentiality is a prerequisite for application of the privilege in a criminal case and has implied that the same is true in civil cases. See *United States v. Smith*, 135 F.3d 963, 972 (5th Cir. 1998)("We have never recognized a privilege for reporters not to reveal nonconfidential information. In fact, this court has theorized that confidentiality is a prerequisite for the news reporters' privilege.").

A number of other circuits, while explicitly extending the privilege to include nonconfidential information, have implied that a lesser showing of need and materiality may be required to obtain such information. See, e.g., *NLRB v. Mortensen*, 701 F.Supp. 244, 248-249 (D.D.C. 1988)(finding qualified journalists' privilege applicable to Board subpoenas, and acknowledging that a lesser showing of need and materiality may be required where nonconfidential information is sought), citing *United States v. Cuthbertson*, 630 F.2d 139, 147 (3rd Cir. 1980), cert. denied, 449 U.S. 1126 (1981)("Of course, the lack of a confidential source may be an important element in balancing the defendant's need for the material sought against the interest of the journalists in preventing production.") and *Continental Cablevision Inc. v. Storer Broadcasting Co.*, 583 F.Supp. 427, 434 (E.D. Mo. 1984) (discovery of nonconfidential materials may not be entitled to the same protection as discovery of the identity of

As indicated above, the subpoenas seek to authenticate certain statements attributed to Eakin by the Petitioners in separate newspaper articles. Specifically, Hasten reported, "Eakin said none of the employees will lose their jobs. He plans to expand and within a year have 300 employees." Randolph reported, "The new Beaird will keep all of the former company's employees, Eakin said." The Employer and Eakin deny the accuracy of the newspaper accounts and maintain that Eakin only stated that he would not comment on an unfinished business transaction.

In opposition to the Petitions to Revoke, the Region contends that if, after further investigation, it appears that Eakin made the alleged disputed statements without contemporaneously indicating that any such future employment would be contingent on changed terms and conditions of employment, it may be appropriate to conclude that the Employer is a "perfectly clear" successor under *Burns*, supra, and thus was not free to unilaterally set initial terms and conditions of employment. In support,

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confidential informants). See also *United States v. Criden*, 633 F.2d 346, 358 (3d Cir. 1980), cert. denied 449 U.S. 1113 (1991)("the defendants probably should be required to prove less to obtain the reporter's version of a conversation already voluntarily disclosed by the self-confessed source than to obtain the identity of the source itself.").

the Region cites *Spruce Up Corp.*, 209 NLRB 194 (1974), enfd. mem. 529 F.2d 516 (1975). In *Spruce Up*, the Board found that an employer may be a "perfectly clear" successor under *Burns* if either of the following circumstances exist: (1) the new employer has actively or, by tacit inference, misled employees into believing they would be retained without change in their wages, hours, or conditions of employment; or (2) the new employer has failed to announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.[3] Although we express no view at this stage regarding the merits of the legal theory advanced by the Region, we find that the subpoenaed documents and testimony arguably could be relevant to determine, inter alia, whether the Employer actively or tacitly misled its predecessor's unit employees into believing that they would be retained without a change in terms and conditions of employment. The subpoenaed information therefore goes to the heart of the Region's investigation.

It appears, moreover, that the information may not be available from alternative nonmedia sources. Eakin

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[3] See *Canteen Co.*, 317 NLRB 1052, 1054 (1995), enfd. 103 F.3d 1355 (7th Cir. 1997)(imposing bargaining obligation under "perfectly clear" exception because of successor's silence regarding new wage rates when initially announcing intent to hire predecessor's employees).

allegedly made the statements at issue in a hallway following his participation in a March 5, 2004 meeting of Louisiana's Economic Development Corporation. The Region contends, and the Petitioners do not dispute, that the pool of potential witnesses present when Eakin made the alleged disputed statements thus far appears to be limited to members of the press, such as Hasten and Randolph. Hasten submits that state officials present at the March 5, 2004 meeting of the Economic Development Corporation and officials of the predecessor constitute alternative sources; however, he does not suggest that they were present in the hallway when Eakin made the alleged disputed statements. Rather, he contends that they may be able to testify regarding similar statements made by Eakin during the meeting of the Economic Development Corporation or during negotiations for the sale of the company. As indicated above, however, the Region's investigation is focused on whether the Employer actively or tacitly misled its predecessor's unit employees into believing they would be retained without a change in terms and conditions of employment. Evidence of statements by Eakin, if any, to state officials or to officials of the predecessor regarding the Employer's intent to retain its predecessor's employees would not shed light on this issue, unless

communicated to the employees. It is entirely speculative, however, whether such statements were made, and there is no suggestion that, even if made, the statements were communicated to the employees. Hence, in contrast to our dissenting colleague's position, it does not appear that state officials in attendance at the meeting of the Economic Development Corporation or officials of the predecessor constitute alternative sources for the information sought.

Accordingly, even assuming, without deciding, that the information sought is covered by a qualified privilege, after weighing the competing interests, we conclude that the Region's need for the information outweighs any possible intrusion on the news gathering process.

We condition our denial of the petitions to revoke the testimonial subpoenas, however, upon the Region supplying the subpoenaed witnesses with a general description of the matters concerning which they will be expected to testify and a copy of the unfair labor practice charge under investigation.

Section 102.31(b) of the Board's Rules and Regulations states, in pertinent part, that the Board shall revoke a subpoena if in its opinion the subpoena "does not describe with sufficient particularity the evidence whose production

is required." The testimonial subpoenas in this case identify, by name and number, the unfair labor practice case in which testimony is sought. Accordingly, under current Board law, they are sufficiently particularized. See *Offshore Mariners*, supra (subpoena ad testificandum was sufficiently particularized where it identified unfair labor practice cases by name and number); *American Postal Workers*, supra.

However, a difference of opinion has arisen concerning whether *Offshore Mariners* and *American Postal Workers* were correctly decided. Specifically, there is disagreement concerning (1) whether the particularity requirement of Section 102.31(b) of the Board's Rules and Regulations applies to a subpoena ad testificandum, and (2) if the particularity requirement does apply, whether a subpoena ad testificandum must describe the testimony sought, as well as identify the relevant unfair labor practice case by name and number. Without deciding these issues, we shall require the Region to provide the subpoenaed witnesses with a copy of the unfair labor practice charge under investigation and a general description of the matters concerning which they will be expected to testify. This would include, but shall not be limited to, whether or not, immediately following his appearance at the March 5, 2004

meeting of Louisiana's Economic Development Corporation, Eakin commented concerning the future employment of predecessor Beaird Industries' unit employees by the Employer; the substance and context of any such comments; and the identity of other possible witnesses. This Order shall be nonprecedential.

Dated, Washington, D.C., July 21, 2006.

PETER C. SCHAUMBER, MEMBER

PETER N. KIRSANOW, MEMBER

MEMBER WALSH, dissenting.

Accepting the majority's framework for analyzing the Petitioners' claim of a First Amendment privilege against compelled disclosure of their news-gathering activities, I would grant the petitions to revoke the General Counsel's investigatory subpoenas. My disagreement with the majority is limited to its finding that the General Counsel has shown that the information he seeks is not available from alternative non-media sources.

The facts are set forth in the majority opinion. In brief, the Petitioners reported in separate newspaper articles that the Employer's principal owner, Samuel Eakin,

made statements to the effect that no employees would lose their jobs as a result of the Employer's purchase of the predecessor company. Eakin allegedly made these statements in a hallway following his participation in a March 5, 2004 meeting of the Board of Directors of the Louisiana Economic Development Corporation (LEDC), which resulted in Eakin obtaining the loan guarantee that he was seeking. The General Counsel issued subpoenas to the Petitioners seeking the production of "all notes and records, in whatever form" that purport to record Eakin's March 5, 2004 statements. The General Counsel is also seeking the Petitioners' testimony concerning whether Eakin made the statements in question, the substance and context of any such statements, and the identity of other possible witnesses.[1]

In their submissions, the Petitioners have identified a number of likely alternative sources for the information that the General Counsel seeks, namely, the individuals present at the March 5, 2004 LEDC meeting. According to one of the newspaper articles, the mayor of Shreveport was present at the LEDC meeting and "joined Eakin in requesting Board approval of the loan." In addition, the Petitioners state that, "[u]pon information and belief, delegates of

[1] Petitioner Mike Hasten has submitted an affidavit that affirms that his newspaper article accurately reported the statements Eakin made.

the Greater Shreveport Economic Development Foundation were also present." Further, the General Counsel concedes that the meeting was open to the public. The Petitioners argue, with considerable force, that the "issue of whether Mr. Eakin's company intended to continue the employment of the acquired company's employees was undoubtedly discussed in the Board's deliberation of whether to approve the requested 1.36 million dollar loan guarantee." In his opposition, the General Counsel acknowledges an obligation "'to exhaust . . . possible [alternative] sources'" (quoting *NLRB v. Mortensen*, 701 F.Supp. 244, 249 (D.D.C. 1988)), but he does not allege that an effort has been made to access these alternative sources, much less exhaust them.

This is not an ordinary investigatory subpoena case. The Board should proceed cautiously where, as here, it is presented with a substantial constitutional claim. On this record, the General Counsel has not made the showing necessary to overcome the privilege that applies to journalists under the majority's framework of analysis.

Dated, Washington, D.C., July 21, 2006.

DENNIS P. WALSH, MEMBER